BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions

The opinion of the United States Customs Court is dated July 27, 1942 and was written by Judge Ekwall, with Judge Cline and Judge Keefe concurring. The decision appears on pages 7, 8 and 9 of the record and is reported in 78 Treas. Dec. Advance Sheet No. 6, page 42, Abstract 47420.

The opinion of the United States Court of Customs and Patent Appeals is dated July 6, 1943 and was written by Judge Jackson. The decision appears on pages 16 and 17 of the record and is reported in 31 C. C. P. A. (Customs) ——, C. A. D. 251, 79 Treas. Dec. Advance Sheet No. 8, page 39.

Jurisdiction

The jurisdiction of this Court is invoked under Section 195 of the Judicial Code as amended (28 U. S. C. A. Section 308). The judgment of the United States Court of Customs and Patent Appeals was entered on July 6, 1943 (R. 18) and the mandate was sent down on August 11, 1943 (R. 18).

Statement

The facts are stated briefly in the petition (pp. 2, 3) and will therefore not be repeated here.

ARGUMENT

I

By virtue of Article VIII of the Cuban Trade Agreement of 1934 (T. D. 47232) the imported rum is exempt from all taxes in excess of $2.00 per proof gallon under the Liquor Taxing Act of 1934.

The language of Article VIII is clear and unambiguous on its face and would seem to require no outside evidence to explain its meaning. Article VIII states that all articles enumerated and described in Schedule II with respect to which a rate of duty is specified in Column 2 shall be exempt from all taxes in excess of those imposed or required to be imposed under our laws in force on the effective date of the agreement.

Rum in bottles containing each one gallon or less is enumerated and described in Schedule II.

A rate of duty is specified in Column 2 for such rum—namely, $2.50 per proof gallon.

On the effective date of the Cuban Trade Agreement (September 3, 1934), the only tax on imported rum was a tax of $2.00 per proof gallon under the Liquor Taxing Act of 1934.

No other law subject to statutory control by the Federal Government of the United States of America imposed or required to be imposed any tax other than the above mentioned tax of $2.00 per proof gallon.

It is extremely doubtful if any clearer or more precise language could have been employed than the language found in Article VIII to express the manifest intention to freeze the tax on Cuban rum at $2.00 per proof gallon.

The third paragraph of Article VIII makes it equally clear that by such laws was meant laws subject to the

statutory control of the Federal Government of the United States of America, which is clearly the case here. It is interesting to note that this third paragraph is not limited to matters subject to the control of the President of the United States but to laws subject to the statutory control of the Federal Government.

A careful analysis of the whole Cuban Trade Agreement fails to reveal any provision which in the slightest degree effects or limits the clear and unequivocal concessions or guarantees of Article VIII.

II

Section 710 Revenue Act of 1938 was not intended to contravene Article VIII of the Cuban Trade Agreement of 1934.

The suggestion that Congress intended by the enactment of Section 710 of the Revenue Act of 1938 to impeach, supersede or otherwise contravene the solemn obligations of the Cuban Trade Agreement has no support in fact or in law and furthermore is not warranted by any sound rule of statutory construction.

The authority conferred by Congress on the President in enacting the Trade Agreements Act was amply broad to sustain a freezing of the internal revenue taxes and any other taxes on Cuban products. The authority of the President to continue to conclude trade agreements having three times been extended by Congress, once on March 1, 1937, again on April 12, 1940 and again on June 7, 1943 it must be presumed that Congress in effect ratified and approved the actions of the executive department in these matters.

Congress should certainly not be placed in the position of having given its consent to the President to freeze the Internal Revenue Tax on Cuban rum at $2.00 per

gallon and then by its own independent action violating a solemn international agreement.

In construing the application of Section 710 therefore this court should be loathe to favor a construction which would cause grave public inconvenience or injury or would lead to absurd consequences.

> *Bird* v. *United States*, 187 U. S. 118, 47 L. ed. 100;
> *Hawaii* v. *Mankichi*, 190 U. S. 197, 47 L. ed. 1016.

If the language of a statute is capable of two interpretations, one of which works manifest injustice, and the other works no injustice, the latter must prevail.

> *Beal's Cardinal Rules of Legal Interpretations*, page 397;
> *Hill* v. *East and West India Dock Co.* (1884), 9 App. Cas. 448, 53 L. J. Ch. 842.

Laws of Congress should receive a sensible construction and general terms should be limited in application so as not to lead to injustice or oppression. Consequently, it will be presumed that the legislature intended exceptions to its language which would avoid such results.

> *United States* v. *Kirby*, 7 Wall. 482, 19 L. ed. 278.

The Revenue Act of 1938 was a broad, general revenue act and contains no specific reference to either the Trade Agreements Act or to any particular trade agreement concluded thereunder. Congress not having expressly repealed or modified Article VIII of the Cuban Trade Agreement, any supposed modification or repeal must be the result of implication.

It is a well established rule of construction that repeal by implication is not favored.

> *Wood County* v. *Lackawanna Iron & Coal Co.*, 93 U. S. 619, 23 L. ed. 989;
> *Arthur* v. *Homer*, 96 U. S. 137, 24 L. ed. 811;
> *Maxwell's Interpretation of Statutes*, Eighth Ed., page 147.

Moreover, where repeal by implication would lead to absurd consequences or where the statute is an important one relating to a government matter, the implication to repeal must be clear, necessary and irresistible.

> *Wood* v. *United States*, 16 Pet. 342, 10 L. ed. 987;
> *Beals* v. *Hale*, 4 How. 37, 11 L. ed. 865;
> *Henderson's Tobacco*, 11 Wall 652, 20 L. ed. 235.

It seems unreasonable to suppose that Congress intended by doubtful inference to repeal or contravene Article VIII of the Cuban Trade Agreement and thus disturb the solemn obligation entered into between the executive department and the republic of Cuba in this vital field of international trade relationships.

> *Fussell* v. *Gregg*, 113 U. S. 550, 28 L. ed. 993.

This is particularly true in view of the fact that the Rvenue Act of 1938 was a broad, general revenue act relating to many classes and kinds of taxes for general revenue purposes and has no relation whatsoever to the conduct of our international relations with the Republic of Cuba.

The dangers of assuming congressional intent to repeal by doubtful inference or implication has given rise to a well established exception in cases where the subject of the earlier legislation is special in nature and the subsequent legislation general.

In such cases it has uniformly been held that a prior special statute is not repealed by a subsequent general statute unless by express reference or necessary implication.

Re Kang-Gi-Shun-Ça, 109 U. S. 556, 27 L. ed. 1030;
Cass County v. *Gillett,* 100 U. S. 585, 25 L. ed. 585;
United States v. *Claflin,* 97 U. S. 546, 24 L. ed. 1082;
Crawford on Statutory Construction, page 430;
Maxwell's Interpretation of Statutes, Eighth Ed., pages 156 to 159;
Beal's Cardinal Rules of Legal Interpretations, pages 579, 520.

"It is a rule that posterior laws repeal prior ones to the contrary. But the rule is subject to a qualification excellently, as it seems to me, expressed by Sir P. B. Maxwell in his book on the interpretation of statutes. He says at page 157 (First Edition) under the heading 'Generalia Specialibus non derogant', 'It is but a particular application of the general presumption against an intention to alter the law beyond the immediate scope of the statute to say that a general act is to be construed as not repealing a particular one by mere implication. A general later law does not abrogate an earlier special Act; or, what is the same thing by custom. Having already given its attention to the particular subject, and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless it manifests that intention in explicit language' ".

Garnett v. *Bradley* (1877), 2 Ex. D. 349, 46 L. J. Ex. 545.

The wisdom of this exception is particularly well illustrated by the facts presented in the instant case. The prior statute or trade agreement related solely to our trade relations with the Republic of Cuba and Article VIII of said agreement clearly and unequivocally froze the tax on Cuban rum. The later statute, namely the Revenue Act of 1938, was a broad, general revenue raising enactment, dealing with income taxes, estate taxes, gift taxes, manufacturer's excise taxes, miscellaneous taxes, taxes on transfers to avoid income taxes, postal rates as well as many administrative provisions. It is certain the Congress did not manifest a clear intention in explicit language such as would permit the repeal of Article VIII by implication.

In the case of *Cook* v. *United States*, 288 U. S. 102, 77 L. ed. 641, a treaty of May 22, 1924 with Great Britain provided for a complete method for dealing with the search and seizure beyond our territorial limits of British vessels suspected of smuggling intoxicating liquors into this country. In holding that the treaty was not abrogated by the later reenactment of Section 581, Tariff Act of 1930 and in dismissing two libels against a vessel and its cargo, the court, at pages 119, 120, stated as follows:

> "The Treaty was not abrogated by reenacting Section 581 in the Tariff Act of 1930 in the identical terms of the Act of 1922. A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed. *Chew Heong* v. *United States*, 112 U. S. 536; *United States* v. *Payne*, 264 U. S. 446, 448. Here, the contrary appears. The committee reports and the debates upon the Act of 1930, like the reenacted section itself, makes no reference to the Treaty of 1924."

That ample grounds exist for believing that Congress never intended to contravene Article VIII, of the Cuban

Trade Agreement, but did in fact intend Cuban products to always be treated upon a preferential basis is clearly demonstrated by the history of the trade relations between our country and the Republic of Cuba.

This preferential treatment existed as far back as the Cuban Reciprocity Treaty of 1902 and continues to exist today. In the Act to Amend the Tariff Act of 1930 approved June 12, 1934, known as the Trade Agreements Act, Section 350 (b) specifically provides as follows:

> "(b) Nothing in this section shall be construed to prevent the application, with respect to rates of duty established under this section pursuant to agreements with countries other than Cuba, of the provisions of the treaty of commercial reciprocity concluded between the United States and the Republic of Cuba on December 11, 1902, or to preclude giving effect to an exclusive agreement with Cuba concluded under this section, modifying the existing preferential customs treatment of any article the growth, produce, or manufacture of Cuba: *Provided,* That the duties payable on such an article shall in no case be increased or decreased by more than 50 per centum of the duties now payable thereon."

Here again Congress itself particularly recognized that products of Cuban origin would be entitled to privileges not accorded to products originating in other countries.

Furthermore an examination of the various trade agreements concluded by the President under the Trade Agreements Act clearly shows that the preferential treatment accorded Cuban products was zealously protected in dealing with other countries. The trade agreements concluded with Belgium (T. D. 47600 effective May 1, 1935); with Haiti (T. D. 47667 effective June 3, 1935); with Sweden (T. D. 47785 effective August 5, 1935); with Brazil (T. D. 48034 effective January 1, 1936); with Canada (T. D. 48033 effective January 1, 1936); with the Netherlands (T. D. 48075 effective February 1, 1936);

with Switzerland (T. D. 48093 effective February 15, 1936); with Honduras (T. D. 48131 effective March 2, 1936); with Columbia (T. D. 48258 effective May 20, 1936); with France (T. D. 48316 effective June 15, 1936); with Guatemala (T. D. 48317 effective June 15, 1936); with Nicaragua (T. D. 48511 effective October 1, 1936); with Finland (T. D. 48554 effective November 2, 1936); with El Salvador (T. D. 48947 effective May 31, 1937); with Costa Rica (T. D. 49072 effective August 2, 1937); with Czechoslovakia (T. D. 49458 effective April 16, 1938); with Ecuador (T. D. 49710 effective October 23, 1938); with Canada (T. D. 49752 effective January 1, 1939); with the United Kingdom (T. D. 49753 effective January 1, 1939); with Turkey (T. D. 49838 effective May 5, 1939); with Venezuela (T. D. 50015 effective December 16, 1939); with the Argentine (T. D. 50504 effective November 15, 1941) and with Mexico (T. D. 50797 effective January 30, 1943), all contain express provisions stating that the advantages now accorded or hereafter accorded by the United States to the Republic of Cuba are excluded from the operations of the various trade agreements with said countries.

Furthermore, the Court of Customs and Patent Appeals has frequently recognized and enforced without fail the obvious treatment of Cuban products on a preferred basis.

F. H. Van Damm v. *United States,* 25 C. C. P. A. (Customs) 97, T. D. 49094; cert. den. 302 U. S. 722;

Louis Wolf & Co. v. *United States,* 27 C. C. P. A. (Customs) 188, C. A. D. 84;

Geo. W. Cole & Co. v. *United States,* 27 C. C. P. A. (Customs) 201, C. A. D. 85;

D. & B. Import Corp. v. *United States,* 29 C. C. P. A. (Customs) 65, C. A. D. 172;

B. & J. Burke, Ltd. v. *United States,* 26 C. C. P. A. (Customs) 374, C. A. D. 44.

Since it is clear from the history of our trade relations with the Republic of Cuba that Congress has always accorded preferential treatment to the products of that country, a fact which the courts have also frequently recognized, it is submitted that Congress never intended Section 710 to in any way modify or repeal Article VIII of the Cuban Trade Agreement Had Congress so intended, it seems manifest that it would have used clear and unequivocal language to express such departures from established treatment.

Congressional intent to repeal being wholly lacking, the court should therefore construe Article VIII and Section 710, together and give effect to both. By excluding the Cuban Rum in the case at bar from the increase provided for by Section 710, the court can continue to give effect to Article VIII in accordance with the expressed intentions of the Congress as well as the parties to the Cuban Trade Agreement, without by any means rendering inoperative or without application Section 710 of the Revenue Act of 1938.

United States v. *Kirby, supra;*
Cook v. *United States, supra.*

In the case of *United States* v. *Lee Yen Tai,* 185 U. S. 213, 46 L. ed. 878, this court reconciled a subsequent treaty with a prior act of Congress relating to the deportation of Chinese laborers. In so doing, the court stated as follows:

> "In *Frost* v. *Wenie,* 157 U. S. 46, 58, this court said:
>
> 'It is well established that repeals by implication are not to be favored. And when two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both' ".

On many occasions this court has considered special laws as exceptions to general statutes, whether passed before or after such general enactments.

Washington v. *Miller,* 235 U. S. 422, 59 L. ed. 295;
Rodgers v. *United States,* 185 U. S. 83, 46 L. ed. 816.

CONCLUSION

It is respectfully submitted that the judgment of the court below is erroneous and that the petition herein should be granted.

September, 1943.

JOHN D. RODE,
Attorney for Petitioner,

NORMAN J. MORRISSON,
of Counsel.